

Cog-Net Bldg. Corp. v Travelers Indem. Co.
2010 NY Slip Op 32497(U)
August 27, 2010
Sup Ct, Richmond County
Docket Number: 100587/10
Judge: Joseph J. Maltese
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COG-NET BUILDING CORP. v. TRAVELERS

Building Corp. (hereinafter, “Cog-Net”) as “loss payee” against risks of loss to commercial premises on Staten Island located at 1870 Richmond Terrace and leased to Motorvations pursuant to a written lease agreement with Cog-Net. To the extent relevant, the tenant was required by said lease to obtain “comprehensive general liability insurance [coverage]..., including property damage with respect to the demised premises..., in the amounts not less than \$1,000,000.00 for injury, and \$250,000.00 for damage to property”, and naming the plaintiff/landlord as an “additional insured”. On February 17, 2009, the subject premises was destroyed by fire.¹ Cog-Net subsequently filed a claim under Motorvations’ policy which Travelers has refused to pay, allegedly, because its insured intentionally caused the fire.

As a result, plaintiff commenced this action wherein RPM is sued individually, i.e., in its capacity as an insurance broker, for (1) negligence in failing to procure proper insurance coverage (the second cause of action), and (2) “breach of representation and agreement” (the third cause of action). Additionally, identical causes of action are asserted against both Travelers, as principal, and RPM (the fourth and fifth, respectively), in its capacity as Travelers’ authorized insurance agent. The first and sixth causes of action, respectively, for breach of contract and reformation of the subject policy based upon mutual mistake are asserted solely against Travelers².

With regard to the causes of action against RPM, it is alleged that this defendant was negligent in improperly designating Cog-Net as a “loss payee” rather than an “additional insured” under the “Business Owners Property Coverage Part” of the subject policy. It is further alleged that RPM also incorrectly stated the replacement cost of the subject building to be \$220,500.00 instead of \$250,000.00, as required by the lease.

¹ Insofar as it appears, the owner of Motorvations, Inc. was arrested and charged with felony counts of second-degree insurance fraud and fourth-degree conspiracy for having arranged the arson that destroyed the subject premises.

² Travelers takes no position on RPM’s motion to dismiss, allegedly, because discovery is needed in this action.

COG-NET BUILDING CORP. v. TRAVELERS

In moving to dismiss the complaint pursuant to CPLR 3211(a)(7), RPM maintains that said pleading is legally insufficient to state a cause of action and must be dismissed for failure to allege privity between itself and RPM, e.g., that Cog-Net was a customer or client of RPM. It is further argued that absent privity, Cog-Net has no standing to maintain any cause of action as against this insurance broker as a matter of law.

Movant further maintains that dismissal is warranted pursuant to CPLR 3211(a)(1) based upon documentary evidence, which consists of a certain endorsement form (Form CG 20 11 01 96) to the subject policy, entitled “Additional Insured-Managers or Lessors of Premises”. According to movant, coverage as an additional insured was, in fact, obtained for Cog-Net as evidenced by this endorsement, thereby refuting plaintiff’s allegations to the contrary and conclusively establishing a defense as a matter of law. In any event, RPM argues that additional insured status for Cog-Net would not confer coverage for its first-party fire damage claim since such designated status merely covers third-party *liability* claims, not first-party *property* claims, which must be sought by Cog-Net as a loss payee on the tenant’s policy. RPM points out that coverage for Cog-Net as a loss payee was admittedly procured.

In opposition, Cog-Net maintains that, as evidenced by the affidavit of its president, Ben Cogna, privity with RPM was, in fact, established when Mr. Cogna contacted RPM’s office and engaged in a conversation with its representative wherein the lease requirements for the owner’s coverage were discussed, and it was confirmed that Cog-Net was properly named as an additional insured for *both* liability and property coverage in accordance with the parties’ lease agreement. According to the affiant, he relied upon RPM’s representations and first learned that RPM issued the policy incorrectly after the fire had occurred.

In further opposition, Cog-Net points out that the subject policy’s “Additional Insured” endorsement applies solely to its “Commercial General Liability Coverage Part”; and that the “Loss Payable Provision” applies to the policy’s “Property Coverage Part”. Plaintiff also claims that since it was named as a loss payee, its right of recovery for damages to the building is barred by the intentional acts of the tenant who caused the fire. Allegedly, had Cog-Net been named as an additional insured on the “Property Coverage Part” of the

COG-NET BUILDING CORP. v. TRAVELERS

subject policy, it would have been entitled to recover as an “innocent coinsured”.

It is well settled that the duty of an insurance broker runs to its client or customer and does not extend to a purported additional insured on a policy procured by such broker since there is no privity of contract giving rise to liability (*see Arredondo v City of New York*, 6 AD3d 328, 329; *Federal Ins. Co. v Spectrum Ins. Brokerage Servs.*, 304 AD2d 316, 317). Thus, an insurance broker can only be held liable for negligence or negligent misrepresentation to a party with whom it has no contractual relationship where that third party had contact with said broker that would “give rise to the sort of relationship, i.e., one approaching that of privity, requisite to the imposition of liability for negligent misrepresentation” (*Benjamin Shapiro Realty Co. v Kemper Natl. Ins. Cos.*, 303 AD2d 245, 245-246, *lv denied* 100 NY2d 573). Alternatively, a cause of action against an insurance broker sounding in negligence for failure to properly procure insurance can survive dismissal where sufficient facts have been alleged to demonstrate that plaintiff was an intended third-party beneficiary of the contract between the broker and its client, e.g., where the defendant broker “was aware, from the moment its client contacted it about procuring coverage, that plaintiff was the intended beneficiary of the coverage, and that plaintiff participated on its own behalf in discussions with defendant and its client about the coverage to be provided” (*Dominion Fin. Corp. v Asset Indem. Brokerage Corp.*, 60 AD3d 461, 462).

Consonant with the foregoing, although no facts supportive of a privity-like relationship between plaintiff and RPM has been alleged in the complaint, thereby rendering it facially deficient, “[w]hen evidentiary material is considered [on a dismissal motion pursuant to CPLR 3211(a)(7)], the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it...dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275). Thus, this Court may freely consider Cog-Net’s affidavit submitted in opposition to RPM’s motion to remedy defects in the complaint, i.e., to provide some factual basis for a claim of negligence and/or negligent misrepresentation (*see Dominion Fin. Corp. v Asset Indem. Brokerage Corp.*, 60 AD3d at 462; *see generally Silvers v State of New York*, 68 AD3d 668, 669).

COG-NET BUILDING CORP. v. TRAVELERS

In light of these principles, this Court is required to accept as true the factual allegations in the complaint and the affidavit submitted in opposition to RPM's motion, as well as accord plaintiff the benefit of every possible favorable inference to be derived therefrom (*see* Sokoloff v Harriman estates Dev. Corp., 96 NY2d 409, 414; Leon v Martinez, 84 NY2d 83, 88). Here, construed liberally, the complaint and supporting affidavit of plaintiff's president, when read together, adequately allege a relationship approaching that of privity between plaintiff and RPM sufficient to withstand dismissal at this early stage of the proceedings (*see* Rovello v Orofino Realty Co., 40 NY2d 633, 635-636; Eastern Consol. Props. v Lucas, 285 AD2d 421, 422; *cf.* Diontech Consulting Inc. v Underwriters at Lloyd's, __ Misc3d __, 2009 NY Slip Op 30531U [Sup Ct Richmond Co, Maltese, J.]).

As for the branch of the motion which is for dismissal of the action against RPM pursuant to CPLR 3211(a)(1), it is the opinion of this Court that the documentary evidence upon which movant relies does not "utterly refute [] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326; *see* Galvan v 9519 Third Ave. Restaurant Corp., __ AD3d __; 901 NYS2d 529; Martin v New York Hosp. Med. Ctr. of Queens, 34 AD3d 650). More particularly, the subject policy does not dispose of the claim that RPM failed to name Cog-Net as an additional insured, rather than a loss payee, for *property* coverage as required by the lease.

Accordingly, it is hereby:

ORDERED, that the motion of defendant Russo Picciurro Maloy, LLC d/b/a RPM Insurance Agency to dismiss the complaint is denied; and it is further

ORDERED, that the movant's time to serve an answer is extended until ten (10) days after service upon it of a copy of this Order with notice of entry.

COG-NET BUILDING CORP. v. TRAVELERS

All parties shall appear in DCM Part 3 for a preliminary conference on **September 21, 2010 at 9:30 a.m.**

E N T E R,

Dated: August 27, 2010

Joseph J. Maltese
Justice of the Supreme Court